Federal Court  Cour fédérale

Date: 20190514

Docket: T-1537-18

Citation: 2019 FC 671

Ottawa, Ontario, May 14, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

MAJOR JOHN S. BEDDOWS

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

[1] In 2012 the Applicant, Major John S. Beddows, was deployed as an intelligence officer for the Canadian Forces' Operation ROTO 2 in Kabul, Afghanistan. An order made on May 9, 2013 repatriated him back to Canada from Afghanistan. The Applicant filed a grievance in respect of the repatriation order on May 26, 2014 which, at the time of the hearing of this matter, remained unresolved.

[2] A second grievance filed by the Applicant in February 2017 underlies the current application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. In this second grievance, the Applicant seeks reimbursement of all legal expenses associated with judicial review proceedings which, in November 2016, resulted in the Federal Court of Appeal returning the first grievance for reconsideration by the Chief of the Defence Staff [CDS]. In a letter dated July 3, 2018, the CDS determined that this second grievance could not be accepted as a valid grievance because it related to the first grievance decision which was still before the final authority for reconsideration in accordance with the order of the Federal Court of Appeal.

I. Background

[3] The Canadian Forces grievance procedure generally includes two levels; the Initial Authority [IA], and the Final Authority [FA], which is the CDS or his or her delegate.

[4] The IA who considered the Applicant's first grievance rejected it in a letter dated November 5, 2014 because: (1) it had not been filed within the six-month period prescribed by the *National Defence Act*, RSC 1985, c N-5, as amended [the *Act*] and the *Queen's Regulations and Orders for the Canadian Forces* [the *QR&O*]; and (2) it was not in the interests of justice to consider the grievance since the delay in filing did not show it resulted from circumstances which were unforeseen, unexpected, or beyond the Applicant's control. The CDS affirmed this result in a letter dated February 18, 2015.

[5] The Applicant sought judicial review of the CDS's decision. This Court allowed the judicial review application and remitted the matter back for reconsideration by a different FA, with a direction that his explanations for late filing be accepted and with costs in his favour in the amount of $2,000.

[6] On appeal, the Federal Court of Appeal (*Canada (Attorney General) v Beddows*, 2016 FCA 294 [*Beddows*]) upheld this Court's determination even though it had failed to apply the standard of reasonableness in reviewing the CDS's decision (*Beddows* at para 25). The Court of Appeal returned the matter to the CDS for reconsideration but did not direct that it be reconsidered by a different FA (because the incumbent CDS had changed) or with acceptance of the Applicant's explanations for late filing of the grievance. It also made no order for costs in regard to the appeal or the judicial review application.

[7] In his second grievance, the Applicant seeks:

> … [1] re-imbursement of all legal fees and costs associated with my successful appeal to the Federal Court for a Judicial Order in my favour, and subsequent appearance as Respondent at the Federal Court of Appeal to obtain their Judicial Order in my favour in the amount of $19,216.95, and [2] that Ref I [DAOD 2017-1, Military Grievance Process], section 12 be changed to authorize re-imbursement of a grievor's legal expenses on receipt of a Judicial Order from the Federal Court, the Federal Court of Appeal or the Supreme Court of Canada in their favour.

[8] The Applicant amended his grievance in March 2017, revising the amount of legal expenses to $17,310.95 instead of the original amount. Eight days after this amendment, the Applicant's commanding officer determined he was not the IA as it was beyond his authority to

resolve and, therefore, forwarded the grievance file to the Director General of the Canadian Forces Grievance Authority [DGCFGA].

[9] The DGCFGA sent the Applicant a letter in October 2017, requesting that he clearly identify which "decision, act or omission in the administration of the affairs of the Canadian Forces" had aggrieved him (as required by Article 7.08(2)(a) of the *QR&O*). The Applicant responded to this letter with one of his own in November 2017, indicating that he was "aggrieved by the unreasonable administrative decision of the Chief of Defence Staff (CDS) in his role as the Final Authority (FA) to refuse to accept his initial grievance", and that "the nature of the CDS' errors as FA were identified by the Justices of the Federal Court of Appeal…". The Applicant further indicated that he had incurred financial expenses "as a result of the CDS' unreasonable administrative decision as FA…".

[10] In a letter dated July 3, 2018, the CDS, acting as the FA, determined the grievance could not be accepted as a valid grievance and, thus, the remedies sought did not need to be addressed. The CDS did not accept the grievance because it related to the first grievance decision which was still before the CDS for reconsideration. The CDS noted that the first grievance had been challenged to the fullest extent, as allowed by the *Act*; and, in view of section 29.15 of the *Act* (which provides that a decision of a FA is final and binding, except for judicial review), a FA is not able to review a previous FA's decision.

II. Issues

[11] In his Memorandum of Fact and Law, the Applicant raises four issues, to wit:

1. Refusing to consider the first grievance (a decision found unreasonable by the Federal Court of Appeal) is itself a grievable decision as it is a separate and distinct decision by the CDS, and so is a separate and distinct "act" pursuant to section 29 of the *Act*;
2. The CDS failed to give adequate reasons in denying the second grievance;
3. The CDS has failed in his duty to act "expeditiously" and "fairly"; and
4. The CDS inappropriately relied on Treasury Board of Canada policy to deny the second grievance.

[12] At the hearing of this matter, the Applicant raised two additional issues: one concerning deficiencies in the certified tribunal record; and a second that he has been denied procedural fairness since this matter should have been referred to the Military Grievances External Review Committee.

[13] The Respondent objected to the Applicant raising these new issues without prior notice. In my view, the Respondent raises a valid objection about these two new issues. In this regard, the Supreme Court of Canada remarked in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, that:

> [22] … Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: [citations omitted]...

> [23] Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal [citations omitted].

[14] In this case, if the Applicant wanted to raise these new issues, he should have alerted the Respondent about this before the hearing. There was ample time to do so. These issues will not, therefore, be considered or addressed further.

[15] The Respondent says the issues to be addressed are:

1. Was the decision of the CDS, acting as the FA, reasonable?
2. Did the CDS provide adequate reasons for his decision?
3. Can this Court review the expeditiousness of the FA's decision regarding the first grievance?

[16] In my view, there is only one issue to address - was the CDS's decision not to accept the second grievance reasonable?

III. Standard of Review

[17] It is well-established that grievance decisions involving members of the Canadian Forces deal with questions of fact or questions of mixed fact and law and, as such, are to be judicially reviewed in accordance with the reasonableness standard (*Walsh v Canada (Attorney General)*, 2016 FCA 157 at para 9; *Moodie v Canada (Attorney General)*, 2015 FCA 87 at para 51; *Zimmerman v Canada (Attorney General)*, 2011 FCA 43 at para 21).

[18] The grievance process in the Canadian Forces is such that the CDS is highly specialized in rendering decisions in the military context, which entitles the CDS to a high degree of deference (*François v Canada (Attorney General)*, 2017 FC 154 at para 32, and *Higgins v Canada (Attorney General)*, 2016 FC 32 at paras 75-77).

[19] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[20] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice.

[21] An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered

to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal recently observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. The Parties' Submissions

(1) Applicant

[22] In the Applicant's view, section 29(1) of the *Act* is broadly worded and allows for grievances based on acts or omissions. He says it was the CDS's unreasonable decision to refuse his first grievance that caused him prejudice and the responsibility to make him whole should be borne by the CDS. But for the CDS's unreasonable decision to reject the grievance he would not have incurred legal expenses. According to the Applicant, costs through the Canadian Forces grievance process are available through *ex gratia* compensation, which is separate and distinct from costs in court, and the awarding of costs by the Federal Courts does not replace redress.

[23] The Applicant contends that the CDS failed to give adequate reasons, in that he did not demonstrate how he arrived at his conclusion that the second grievance did not raise a grievable issue. The Applicant points to section 8.8 of the *Defence Administrative Orders and Directives 2017-1*, and says that, in the absence of a clearly expressed analytical method, the CDS's conclusion that the matter in the second grievance had already been grieved is unreasonable.

[24] The Applicant notes that, while there are no statutory time limits within which the CDS must decide a grievance, section 29.11 of the *Act* requires the CDS to act as "expeditiously as the circumstances and the considerations of fairness permit". In the Applicant's view, "expeditiously" inherently imposes an urgent time limit on the CDS for the resolution of grievances, and failure by the CDS to act expeditiously in dealing with grievances is inherently unfair.

[25] The Applicant says it was wrong for the CDS to have relied on the Treasury Board policy on legal assistance and indemnification referred to in the DGCFCA letter. The Applicant notes that the CDS's discretion in the administration, conduct, and management of the grievance process under section 29 of the *Act* is absolute and established by the legislative branch and, as such, it should be completely unfettered by Treasury Board policies.

(2) Respondent

[26] According to the Respondent, the "decision, act or omission" that the Applicant seeks to grieve was the decision of the FA to reject the first grievance. In view of section 29.15 of the *Act*, the Respondent says a FA is not able to review the decision of a previous FA. The Respondent further says the appropriate recourse for a member of the Canadian Forces dissatisfied with a decision of a FA is to pursue an application for judicial review, a course of action of which the Applicant availed himself.

[27] The Respondent also says the Applicant's success at the Federal Court of Appeal does not give rise to a fresh grievance. The Applicant's forum for seeking his legal costs was through

the judicial review process. Contrary to the Applicant's submissions, the Respondent says one of the purposes of costs in the courts is for partial indemnification of the successful party. In the Respondent's view, the Applicant sought review of the Court of Appeal's decision on the issue of costs before the CDS. According to the Respondent, this is impermissible because it amounts to a collateral attack on the decision of the Federal Court of Appeal.

[28] The Respondent states that the remedy the Applicant sought in the second grievance was the same remedy he sought by seeking a costs award at the Federal Court of Appeal, and he cannot circumvent the order of that court by now characterizing his request as one for an *ex gratia* payment as opposed to a costs award.

[29] In the Respondent's view, there is no evidence that the CDS relied on the Treasury Board policy, nor is there any reason for him to have done so.

[30] The Respondent says the CDS's reasons for the decision were clear and intelligible and explain why the decision was reached. The Respondent notes that the CDS cited the exact nature of the grievance claimed by the Applicant and stated that he had explicitly indicated he was grieving the decision of the FA to reject the first grievance.

[31] In the Respondent's view, it is unclear what the nature of the delay the Applicant was grieving - was it concerning the rejection of the first grievance, or the time that the grievance has taken to be redetermined since it was sent back for reconsideration by the Federal Court of Appeal? According to the Respondent, the Applicant did not raise any issue regarding the delay

since the decision by the Federal Court of Appeal, and he is now prohibited since a court cannot review a decision that was not in front of the decision-maker. If the Applicant's claim is with respect to a perceived delay in the decision-making process regarding the first grievance, he has already had an opportunity to challenge the procedural fairness of that decision during his previous application for judicial review.

V. Analysis

[32] The Applicant wants the Canadian Forces to pay his legal expenses associated with the judicial review proceedings. There is, however, no law, policy, or other instrument which grants the Canadian Forces the power or discretion to pay for legal expenses incurred as a result of a grievance that precipitated judicial review proceedings.

[33] The Federal Court of Appeal determined that costs were not appropriate. Any consideration of costs is, in my view, *res judicata* and cannot be reviewed again by this Court. I agree with the Respondent that the second grievance constitutes a collateral attack on the first grievance which, at the time of the hearing of this application, remained unresolved. In *Wilson v The Queen*, [1983] 2 SCR 594, the Supreme Court explained the nature of a collateral attack as follows:

> 8. … It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as

> proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. …

[34] It is true, as the Applicant correctly points out, that section 29.11 of the *Act* requires the CDS to act in the grievance process as "expeditiously as the circumstances and the considerations of fairness permit". The Court notes that the Applicant's first grievance was determined by the former CDS in a letter dated February 18, 2015, approximately nine months after the Applicant filed the grievance. More than two years have now passed since the Federal Court of Appeal returned the matter to the CDS for reconsideration. Is this expeditious?

[35] Although the word "expeditiously" connotes something that is swiftly, quickly, promptly, or efficiently done, the Court cannot speculate as to the reasons for the delay in the CDS's reconsideration of the first grievance. It is simply not aware of all the circumstances or reasons for the delay. All that the Court should say in this regard is that the reconsideration should occur sooner rather than later.

VI. Conclusion

[36] In conclusion, I find it was reasonable for the CDS to determine that the Applicant's request for repayment of legal expenses was not a grievable issue. The CDS clearly articulated his reasons for not accepting the Applicant's grievance. The reasons are justifiable, transparent, and intelligible, and the decision falls within a range of possible outcomes which are defensible in respect of the facts and law. The Applicant's application for judicial review is, therefore, dismissed.

[37] Each party requested their costs in respect of this application. The Respondent has been successful in this application and is entitled to costs. The Applicant shall pay costs to the Respondent in a lump sum amount of $500 within 30 days of the date of this judgment.

JUDGMENT in T-1537-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and the Applicant shall pay costs to the Respondent in a lump sum amount of $500 within 30 days of the date of this judgment.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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